COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 018269-91**

Edward Dullea	Employee
General Electric Co.	Employer
Electric Insurance Co.	Self-insurer

REVIEWING BOARD DECISION
(Judges Horan, McCarthy and Fabricant)

APPEARANCES
Timothy F. Nevils, Esq., for the employee
Thomas P. O'Reilly, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

HORAN, J. The self-insurer appeals a decision awarding the employee permanent and total incapacity benefits. Chiefly, the self-insurer takes exception to the judge's finding that the seventy-one year old employee's refusal to undergo knee replacement surgery was not unreasonable. We affirm the decision.

The employee worked as a machine operator. The employee's left knee buckled while he was moving a heavy oily casing at work on March 12, 1991. He tore his left lateral and medial menisci, and underwent surgery on June 11, 1991. The surgery produced only mild improvement, as the employee's left knee pain persisted. (Dec. 3-4.)

The self-insurer accepted the case. Thereafter, the employee filed a claim for permanent and total incapacity benefits. At a § 10A conference on November 15, 2002, the judge ordered the self-insurer to pay partial incapacity benefits. The employee appealed to a full evidentiary hearing. (Dec. 2.)

At the hearing, it was revealed that in 2001, the employee's treating doctor prescribed a total knee replacement. The employee decided against the recommendation based on his adverse reaction to anesthesia in prior surgeries, his fear of a negative result with additional debilitating consequences, his desire to avoid narcotic pain medication,

and his failure to recover from prior surgical procedures.[1] The judge credited the employee's testimony. (Dec. 4.)

The § 11A impartial physician, Dr. James S. Hewson, opined the employee suffered from severe osteoarthritis of the left knee, with tears to the left medial and lateral menisci, causally related to the March 12, 1991 work injury. The doctor restricted the employee from work involving sitting, standing, the use of stairs, and prolonged walking, and felt the employee's condition was worsening. Dr. Hewson believed a total knee replacement would be a reasonable course of treatment and, if successful, would improve the employee's ability to stand and climb stairs. However, the doctor identified significant risks related to surgery, including blood clots, pneumonia, and infection. He also acknowledged the patient's state of mind was a major factor in any surgical decision, and believed that a refusal to undergo surgery under the aforementioned circumstances would not be unreasonable. The judge adopted Dr. Hewson's opinion. (Dec. 4.)

The self-insurer contends the employee's refusal to have knee replacement surgery bars, as a matter of law, his entitlement to receive permanent and total incapacity benefits. (Ins. br. 17.) We disagree. The judge chose to credit both the employee's concerns about surgery, and Dr. Hewson's "final opinion that total knee replacement was not a simple operation, that there were serious risks to the employee, and that the employee's refusal would not be unreasonable." (Dec. 5.) The judge's findings of fact are supported by the evidence, and we are satisfied he reached his conclusions mindful of our applicable legal precedent. E.g., Snooks's Case, 264 Mass. 92, 93 (1928)(while "[i]nstances . . . may occur when all the evidence is so clear that the decision presents merely a question of law," the issue is generally a question of fact); see also Burns's Case, 298 Mass. 78 (1937); Smith v. Kingston Oil & Gas, 13 Mass. Workers' Comp. Rep. 203 (1999). This case falls well within the general rule. The judge's factual findings were specific and appropriately focused on the analysis set out in Snooks:

[1] The employee suffered from many medical problems unrelated to work, including prostate and lung conditions (both resulting in surgery), glaucoma, cataracts, and a significant hearing impairment.

"[w]hether in a particular case there is such risk and danger, and whether it fairly appears that a substantial gain will result from a suggested surgical operation." Id.[2]

The self-insurer's contention that the employee was required, but failed, to demonstrate a worsening[3] of his medical condition from partial to permanent and total incapacity is without merit. Because his entitlement to § 35 benefits had been established by agreement,[4] and not by hearing decision, the employee was not required to prove "worsening". Listaite v. Worcester Telegram & Gazette, 17 Mass. Workers' Comp. Rep. 485, 488 (2003); Hovey v. Shaw Indus., 16 Mass. Workers' Comp. Rep. 136, 139 (2002).

Lastly, we summarily dismiss the self-insurer's contention that the judge mischaracterized Dr. Hewson's opinion. Accordingly, we affirm the decision of the administrative judge. Pursuant to § 13A(6), employee's counsel is awarded a fee of $1,312.21.

So ordered.

Mark D. Horan	William A. McCarthy	Bernard W. Fabricant
Administrative Law Judge	Administrative Law Judge	Administrative Law Judge

Filed: April 6, 2005

[2] The self-insurer's extended argument based on Retirement Bd. of Revere v. Contributory Ret. App. Bd., 36 Mass. App. Ct. 99 (1994), is misplaced. In that case, the employee *inexplicably* refused an arthroscopic procedure for a torn medial meniscus; in the present case, the employee is well beyond that procedure, and is now contemplating a *total knee replacement* with significant attendant risks.

[3] See Foley's Case, 358 Mass. 230, 232 (1970).

[4] We take judicial notice of the departmental forms in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).